IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02413-MEH

WALDEMAR BRUZDA,
JACEK JOZEFKOWICZ, and
THOMAS GARBOWSKI,

Plaintiffs,

v.

SONIC AUTOMOTIVE d/b/a Murray BMW of Denver,

Defendant.

ORDER

Before the Court is Defendant's Motion to Compel Arbitration and to Dismiss with Prejudice or, in the Alternative, to Stay Proceedings Pending Arbitration [filed November 4, 2016; ECF No. 13]. The Motion is fully briefed, and oral argument, which the parties did not request, would not materially assist the Court in its adjudication. Because Defendant defaulted in a prior arbitration proceeding, 9 U.S.C. §§ 3 & 4 requires the Court to deny Defendant's Motion to Compel Arbitration.[1]

BACKGROUND

This case arises from alleged discrimination during Plaintiffs' employment with Defendant's subsidiary dealership, Murray BMW of Denver ("Murray"). While Plaintiffs were employed by Murray, each of them signed arbitration agreements, which specifically required them to arbitrate Title VII and Age Discrimination in Employment Act ("ADEA") claims. *See* Comp. ¶ 32; ECF No.

[1] On November 16, 2016, the parties consented to this Court's jurisdiction pursuant to 28 U.S.C. § 636(c) and D.C. Colo. LCivR 40.1(c). ECF No. 17.

14. In accordance with the arbitration agreements, Plaintiffs initially submitted to arbitration the Title VII and ADEA claims giving rise to this lawsuit. Compl. ¶ 8; Decl. of Roman Zhuk ¶ 7, ECF No. 13-4.

On July 25, 2016, the American Arbitration Association ("AAA") sent a letter to the parties confirming its receipt of the claim documents and informing the parties that Plaintiffs must pay a filing fee of $200.00 and Defendant owes a fee of $1,500.00. ECF No. 1-1, at 2–3. After Plaintiffs paid their portion of the fee, AAA sent a subsequent letter to counsel for Defendant, which requested that Defendant submit its $1,500.00 payment on or before August 19, 2016. *Id.* at 6–7. Although Defendant's counsel emailed Defendant on August 16, 2016 to request the status of payment to AAA, Exhibit A to Decl. of Lori Franz, ECF No. 13-2, Defendant did not pay AAA before the August 19 deadline. As a result, AAA sent another letter to Defendant on August 24, 2016, which again advised Defendant of its fee obligation and extended the payment deadline to September 2, 2016. ECF No. 1-2, at 2–3. The letter also informed Defendant that if it did not comply with the payment obligation, AAA would refuse to administer Defendant's future cases. *Id.* at 2.

On August 31, 2016, Defendant's legal secretary emailed Murray to request that it overnight the $1,500.00 fee to AAA. Decl. of Lori Franz ¶ 5; Exhibit B to Decl. of Lori Franz. Murray then sent a check for $500.00 to AAA without designating to which account AAA should post the check. Exhibit D to Decl. of Lori Franz. AAA applied the check to one of Defendant's accounts for a separate matter that had a balance of $500.00. Exhibit F to Decl. of Lori Franz.

On September 15, 2016, AAA sent yet another letter to the parties, informing them that if Plaintiffs wanted to continue with arbitration, they could pay Defendant's outstanding fee on or before September 22, 2016. ECF No. 1-2, at 9. The letter also stated that if AAA did not receive

a payment from Plaintiffs by September 22, it would cease administration of the dispute. *Id.* Defendant did not take any action to satisfy its outstanding obligation until September 23, 2016, when it emailed its subsidiary, Murray, to request payment of the $1,000.00 balance. Exhibit G to Decl. of Lori Franz. Also on September 23, Defendant emailed Larry Allston—a finance supervisor with AAA—to determine the balance of the fee Defendant owed. Exhibit F to Decl. of Lori Franz. In response, Mr. Allston informed Defendant that he transferred the $500.00 to the correct account and told the intake department that Defendant would submit the remainder of the fee to them. *Id.* Notwithstanding this, AAA determined it was proper to close the case. On September 23, 2016, AAA sent a letter to the parties stating that "[o]nly $500 of the $1,500 due from [Defendant] was received. Accordingly, we have administratively closed our file on this matter. Any filing fees received will be refunded under separate cover." ECF No. 1-2, at 12. Additionally, the letter stated that AAA "will decline to administer any future employment matter involving" Defendant. *Id.*

Defendant subsequently mailed the remaining balance to AAA on September 27, 2016. Decl. of Roman Zhuk ¶ 3, ECF No. 24-1. Roman Zhuk (Defendant's outside counsel) then contacted AAA's employment filing team, who informed him that "Claimant's counsel would have to restart the claim for it to proceed forward." *Id.* Instead of proceeding with arbitration, Plaintiffs filed the present case on September 26, 2016. Defendant responded to the Complaint by filing the present Motion to Compel Arbitration under 9 U.S.C. §§ 3 & 4. Def.'s Mot. to Compel, ECF No. 13.

LEGAL STANDARDS

Whether to enforce an arbitration agreement involves a two-step inquiry. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). First, the court must determine

whether the parties agreed to arbitrate the dispute. *Id.* at 626. Second, the court must analyze whether a statue or policy renders the claims nonarbitrable. *Id.* at 628. "There is a strong federal policy favoring arbitration for dispute resolution." *Coors Brewing Co. v. Molson Breweries,* 51 F.3d 1511, 1514 (10th Cir. 1995) (quoting *Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 465 (10th Cir. 1988)). Therefore, if there is uncertainty as to whether a claim is arbitrable, "[a]ll 'doubts are to be resolved in favor of arbitrability.'" *Id.* (quoting *Oil, Chem., & Atomic Workers Int'l Union, Local 2-124 v. American Oil Co.*, 528 F.2d 252, 254 (10th Cir. 1976)).

Consistent with this underlying policy, courts should stay a federal action pending completion of arbitration, unless arbitration has been "had in accordance with the terms of the agreement" or the applicant for the stay defaulted in proceeding with the arbitration. 9 U.S.C. § 3. Additionally, under 9 U.S.C. § 4, "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed . . . ."

ANALYSIS

Plaintiffs do not challenge that they signed arbitration agreements, which initially required arbitration of the underlying claims. Instead, the parties contest whether the claims are nonarbitrable under 9 U.S.C. §§ 3 & 4, in light of AAA's dismissal of the prior arbitration proceeding. Defendant contends it has not waived its right to arbitrate, because it acted with reasonable diligence to ensure payment of its arbitration fees. Def.'s Mot. 13; Def.'s Reply 4, ECF No. 24. Moreover, Defendant asserts that the arbitrator, not this Court, should decide allegations of waiver or default. Def.'s Mot. 13. Plaintiffs contend that Defendant cannot enforce the arbitration agreement, because AAA dismissed the prior proceeding due to Defendant's failure to pay fees. Pl.'s Resp. 7–9. Additionally,

Plaintiffs argue equitable principles render the arbitration agreement unenforceable. *Id.* at 9–10. Based on binding Tenth Circuit precedent and persuasive cases from this District and other circuits, the Court finds that Defendant's failure to pay fees in the prior proceeding precludes it from seeking arbitration under 9 U.S.C. §§ 3 & 4.

9 U.S.C. § 3 requires a court to stay a case with claims that are subject to a binding arbitration agreement unless the party seeking the stay defaulted in a prior arbitration. Contrary to Defendant's contention that an arbitrator should decide default, "[t]he question of default under § 3 is not reserved for a formal finding by arbitrators." *Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287, 1296 (10th Cir. 2015).

In *Pre-Paid Legal Services*, the Tenth Circuit considered whether a defendant may enforce an arbitration agreement when an arbitrator dismissed an initial claim because of the defendant's failure to pay fees. 786 F.3d at 1293–95. Although the plaintiff initially filed the lawsuit in federal district court, the court stayed the case pending arbitration. *Id.* at 1288. Once the plaintiff submitted the claims to arbitration, the plaintiff paid its share of arbitration fees, but the defendant did not. *Id.* at 1288–89. After AAA gave the defendant repeated warnings that the arbitration case would be suspended if the defendant failed to pay, AAA suspended and eventually terminated the proceeding. *Id.* at 1289. The federal district court then lifted the stay, and the defendant appealed. The Tenth Circuit held that the defendant could not enforce the arbitration agreement under 9 U.S.C. § 3. *Id.* at1293–95. According to the court, when AAA terminated the proceeding because of the defendant's failure to pay, the arbitration was "had," as that term is used in Section 3. *Id.* at 1293–94. Moreover, by refusing to pay his arbitration fees, the defendant was in default. *Id.* at 124–95.

This District has applied *Pre-Paid Legal Services* in circumstances similar to the present case. In *Norgren, Inc. v. Ningbo Prance Long, Inc.*, the defendant initiated an arbitration proceeding before any federal court proceedings were pending. No. 14-cv-03070-CBS, 2015 WL 5562183, at *2 (D. Colo. Sept. 22, 2015). The plaintiff (the respondent in the arbitration) paid its arbitration fees contemporaneously with its answer and counterclaim. After the arbitrator sent multiple notices to the defendant stating that the arbitration could not proceed until the defendant paid its share of the fees, the arbitrator dismissed the claims without prejudice. *Id.* at *7. Shortly thereafter, the defendant initiated a second arbitration, in which it paid its full filing fee. *Id.* The plaintiff objected to the arbitration and filed suit in federal court. *Id.* Relying on *Pre-Paid Legal Services*, the court denied the defendant's motion to compel arbitration. *Id.* at *9–10, 13. According to the court, "by virtue of [the defendant's] actions in [the] First Arbitration, [the defendant] defaulted on or waived its arbitration rights under the parties' Purchase Agreement and is thereby barred from asserting those rights anew in the Second Arbitration." *Id.* at *13.

Similarly, this Court holds that because of Defendant's failure to pay its arbitration fees, Defendant is barred from asserting its rights under the arbitration agreement. As was true in *Pre-Paid Legal Services* and *Norgren*, Defendant did not respond to AAA's first two payment notices. After AAA's third notice, Defendant issued a check for $500.00 (a third of its required fee) two days before the extended payment deadline. AAA sent another notice on September 15, 2016, informing the parties that because Defendant had still not paid its share of the filing fee, Plaintiffs could choose to cover the fee by September 22, 2016. Defendant took no action in response to this notice until September 23, 2016—the same day AAA found it proper to close the case. Therefore, similar to *Pre-Paid Legal Services*, "AAA repeatedly warned [Defendant] that if [it] did not pay, the

arbitration proceedings would be [terminated], which is exactly what happened." 786 F.3d at 1289. Because "AAA determined the arbitration had gone as far as it could due to [Defendant's] repeated refusal to pay the fees," the arbitration was "had," as that term is used in 9 U.S.C. § 3. *Id.* at 1294. Moreover, because "[f]ailure to pay arbitration fees constitutes a 'default' under § 3," Defendant cannot enforce the arbitration agreement.[2] *Id.* at 1294–95.

Defendant attempts to distinguish *Pre-Paid Legal Services* on two grounds. First, Defendant argues that because the case addresses only the right to a stay under Section 3, it is not dispositive of the present Motion, which Defendant also brings under Section 4. Def.'s Reply 3. According to Defendant, because Section 4 does not contain "default" language analogous to Section 3, the Court cannot refuse to enforce the agreement under Section 4. *Id.* However, this argument was specifically rejected in *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197, 1200–01 (9th Cir. 2003)—a case relied on by the Tenth Circuit in *Pre-Paid Legal Services*. In *Sink*, the defendant argued that because "the language of § 4 which, in contrast to § 3, contains no express condition that a party seeking to compel arbitration not be in default in proceeding with arbitration," "§ 4 leaves a district court no choice but to order a return to arbitration." *Id.* at 1200. In response to this argument, the court stated:

[I]t cannot sensibly be maintained that a district court is required to enter an order

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[2] In its Motion and Reply, Defendant asserts it has not "waived" its right to arbitration. Def.'s Mot. 9–10; Def.'s Reply 4. However, as noted by the Tenth Circuit in *Pre-Paid Legal Services*, "some courts have viewed a party's failure to pay its share of the arbitration fees as a breach of the arbitration agreement . . . [while] [o]ther courts have treated the failure to pay arbitration fees as a waiver of the right to arbitrate. Under either approach, the result is the same: [the defendant's] failure to pay his share of the costs precludes him from seeking arbitration." 786 F.3d at 1295 n.3 (citations omitted). Therefore, regardless of whether the Court considers Defendant's actions a "default" or a "wavier," Defendant cannot enforce its rights under the arbitration agreement.

> under § 4 compelling parties to return to arbitration under circumstances where § 3 precludes the district court from staying its own proceeding. Such an interpretation of § 4 would interfere with the manifest intent of Congress, as expressed in § 3, that arbitration is to be furthered where a party has not defaulted in arbitration, and would lead to duplicative and potentially inconsistent decisions if an arbitral forum and a court action were to proceed at the same time on the same claim.

Id. at 1200–01; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (stating that Sections 3 and 4 provide "two parallel devices for enforcing an arbitration agreement . . . .").

Next, Defendant attempts to distinguish *Pre-Paid Legal Services* on factual grounds. Defendant asserts that in *Pre-Paid Legal Services*, the defendant completely refused to comply with AAA's request for fees, while in the present case, Defendant "took reasonably diligent steps to pay arbitration fees . . . ." Def.'s Reply 4. Defendant is correct that its $500.00 payment and its post-termination payment of the remaining balance gives some indication that Defendant intended to engage in arbitration. However, notwithstanding this, AAA chose to terminate the proceeding due to Defendant's untimely and incomplete payment. This is not a case where the defendant diligently attempted to pay the fee for the entire time period, but was unable to due to an administrative error or misunderstanding. Indeed, Defendant did nothing in response to AAA's first two payment notices. After AAA's third notice, Defendant issued a check for a third of the outstanding balance, notwithstanding that each notice contained the exact amount Defendant needed to pay. Although Defendant contends the insufficient payment was due to an administrative error, if Defendant made this error after the first or second payment notice, the issue would likely have been resolved prior to AAA terminating the case. Moreover, instead of confirming that AAA received the check, Defendant waited until eight days after AAA's fourth non-payment notice, and one day after the final payment deadline, to take any further action. Although Defendant's non-payment may not

have been as egregious as that in *Pre-Paid Legal Services*, Defendant's failure to pay its entire fee still resulted in closure of the arbitration proceeding and the arbitrator's statement that it would no longer preside over Defendant's cases. Pursuant to *Pre-Paid Legal Services*, this prevents Defendant from enforcing the agreement.

Defendant also argues that it has not waived it right to arbitrate, because "AAA's Employment Filing team has in fact indicated that it was willing to reopen the case should Plaintiffs instruct them to reopen it." Def.'s Reply 4. However, Defendant's assertion is both incorrect and inconsequential. AAA never indicated it was willing to reopen the case. Instead, a member of AAA's employment filing team allegedly told Defendant that Plaintiffs' "counsel would have to *restart* the claim for it to proceed forward." Decl. Or Roman Zhuk ¶ 3, ECF No. 24-1 (emphasis added). Therefore, Plaintiffs would have had to initiate an entirely new case, not simply reopen the prior proceeding. Importantly, Defendant's willingness to pay fees in that case is insufficient to overcome the prior default. In *Norgren*, the court stated:

> [The defendant] argues that *Pre-Paid Legal Services* is not controlling because [the defendant] has paid its required fees in the Second Arbitration and is not in default in that particular proceeding. This argument, however, is squarely at odds with the Tenth Circuit's unambiguous statement that 'a party's failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by that party to enforce the agreement.'

2015 WL 5562183, at *10 (quoting *Pre-Paid Legal Services*, 786 F.3d at 1294).

Defendant next asserts that AAA administrative actions have no bearing on the enforceability of an arbitration agreement. Def.'s Reply 4–5. However, the Tenth Circuit's holding in *Pre-Paid Legal Services* makes clear that an arbitrator's termination of a proceeding for failure to pay has direct implications on the enforceability of the arbitration agreement. 786 F.3d at 1294–95; 1298 ("[T]his termination constituted a finding of default because it was the result of [the defendant's]

failure to pay."); *see also Rapaport v. Soffer*, No. 2:10-cv-00935-KLD-RJJ, 2011 WL 1827147, at *2 (D. Nev. May 12, 2011) (finding that the defendant was in default, because "AAA 'closed' or 'terminated' the arbitration" due to the defendant's failure to pay). Although Defendant states that the arbitrator did not in fact dismiss the case, but just "administratively closed" it, the letter closing the case specifically stated that AAA "will decline to administer any future employment matter involving respondent." ECF No. 1-2, at 12. The Court struggles to see a difference between dismissing a case and administratively closing one with no opportunity to reopen.[3] Therefore, when AAA closed the case for failure to pay, Defendant defaulted in arbitration.

CONCLUSION

In sum, Defendant forfeited its ability to enforce the arbitration agreement when AAA administratively closed the parties' case because of Defendant's failure to pay fees despite multiple payment notices. The arbitration was "had in accordance with the terms of the agreement," and Defendant was "in default in proceeding with such arbitration." 9 U.S.C. § 3. Because the Court holds that Defendant has breached the arbitration agreement, the Court need not reach Plaintiffs' argument that Defendant's economic advantage renders the agreement unconscionable. Accordingly, Defendant's Motion to Compel Arbitration and to Dismiss with Prejudice or, in the Alternative, to Stay Proceedings Pending Arbitration [filed November 4, 2016; ECF No. 13] is **denied**.

[3] As stated above, although there is some indication that AAA later became willing to arbitrate the case, it would not allow Defendant to reopen the case. Instead, it required Plaintiffs to re-file.

Entered and dated at Denver, Colorado, this 23rd day of January, 2017.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge